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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 430

CHUNG LEUNG, ET AL., PETITIONERS

v.

P. A. ESPERDY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The court of appeals' *per curiam* order of affirmance is unreported.

QUESTION PRESENTED

Whether the Immigration Service's special inquiry officer exceeded his authority in naming the countries to which concededly deportable aliens were to be sent.

STATUTES AND REGULATIONS INVOLVED

Section 103(a) of the Immigration and Nationality Act, 8 U.S.C. 1103(a) authorizes the Attorney General

> to appoint such employees of the Service as he deems necessary, and to delegate to them or to any officer or employee of the Department of Justice in his discretion any of the duties

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and powers imposed upon him in this Act; he may require or authorize any employee of the Service of the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this Act or regulation issued thereunder upon any other employee of the Service.

Section 101(b)(4) of the Immigration and Nationality Act, 8 U.S.C. 1101(b)(4), provides:

> The term "special inquiry officer" means any immigration officer who the Attorney General deems specially qualified to conduct specified classes of proceedings, in whole or in part, required by this Act to be conducted by or before a special inquiry officer and who is designated and selected by the Attorney General, individually or by regulation, to conduct such proceedings. Such special inquiry officer shall be subject to such supervision and shall perform such duties, not inconsistent with this Act, as the Attorney General shall prescribe.

Section 242(b) of the Immigration and Nationality Act, 8 U.S.C. 1252(b) provides, in pertinent part:

> A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation * * *. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as

provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. * * *

8 CFR 242.8(a) provides, in pertinent part:

In any proceeding conducted under this part the special inquiry officer shall have the authority * * * to determine the country to which an alien's deportation will be directed in accordance with section 243(a) of the Act * * *.

8 CFR 242.18(c) provides:

* * * When deportation is ordered, the special inquiry officer shall specify the country, or countries in the alternate, to which respondent's deportation shall be directed. * * *

STATEMENT

Both petitioners are Chinese aliens who arrived in the United States as crewmen in December 1964; they are concededly in the United States illegally and their deportability is not in dispute.[1] Petitioners were given hearings before a special inquiry officer, during which each conceded his deportability and was asked to designate the place of his deportation, in accordance with Section 243(a) of the Immigra-

[1] Since the facts are undisputed no portion of the record, other than the docket entries, was printed in the court below. However, the certified administrative records were presented to the district court and were considered by it, and they were available to the court of appeals, which accepted the factual statements in the briefs and argument. The certified administrative records have been lodged with the Clerk of this Court.

tion and Nationality Act, 8 U.S.C. 1253(a). Petitioner Chung Leung designated Hong Kong as the country to which he wished to be deported, and petitioner Hsu Mio John designated the Republic of China on Formosa. The special inquiry officer, in conformity with the designations by petitioners, ordered their deportation to Hong Kong and the Republic of China on Formosa, respectively. The Board of Immigration Appeals affirmed, rejecting a contention by petitioners that the special inquiry officer was unauthorized to name the country of deportation.

Petitioners then instituted habeas corpus proceedings challenging the deportation orders. The petitions were dismissed, and the court of appeals affirmed in open court.

* * *

ARGUMENT

1. There is no substance to petitioners' claim that special inquiry officers may not designate the countries to which deportable aliens are to be sent. The language of the statute does not limit the officers' power. Section 101(b)(4) authorizes them to "perform such duties, not inconsistent with this Act, as the Attorney General shall prescribe," and Section 242(b) empowers special inquiry officers "as authorized by the Attorney General [to] make determinations, including orders of deportation" (p. 2, *supra*).[2]

[2] The practice before 1962 had been for special inquiry officers to make determinations of deportability and to have the place of deportation fixed by other officers. See *Teo Chai Tiam v. Kennedy*, 293 F. 2d 543 (C.A.D.C.); *Ying v. Kennedy*, 292 F. 2d 740 (C.A.D.C.), certiorari denied, 368 U.S. 914. But the

In any event, there was no disagreement regarding the countries to which petitioners were to be sent. The inquiry officer complied with their explicit requests. Consequently, even if there was an erroneous delegation of authority, petitioners were not prejudiced by it.

2. Nor did the hearing become unfair because the place of deportation was determined by the special inquiry officer rather than by some other official. Petitioners do not suggest how inquiry officers considering questions of deportability and discretionary relief might be prejudiced by knowledge regarding an alien's choice of the country to which he wishes to be deported. Nor is the determination of the place of deportation likely to be adversely affected by evidence pertaining to other issues before the inquiry officer. Indeed, the fairness of the place-of-deportation decision is increased when it is made pursuant to an adversary hearing rather than by executive decision alone. And petitioners, having been ordered deported to the countries which they selected, are in no position to complain about the fairness of that decision.

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present procedure was adopted soon after the enactment of a statute regarding judicial review on September 26, 1961 (P.L. 87-301, 75 Stat. 650), which was intended to minimize multiple court challenges to the deportation process. Revised regulations thereafter combined all determinations, including those which deal with the place of deportation, in a single proceeding. 26 F.R. 12110, 12112. This change actually revived the practice followed before 1950. See Gordon and Rosenfield, *Immigration Law aand Procedure* (1962 rev.) p. 552.5.

Petitioners' suggestion that the place-of-deportation decision is an "enforcement function" lacks merit. That decision, like the determination of deportability, is governed by explicit statutory criteria. See Sections 243 and 241 of the Immigration and Nationality Act, 8 U.S.C. 1253 and 1251. Both entail an assessment of factual and legal considerations, and in both instances the special inquiry officer is fulfilling the mandate of Section 242(b) to "make determinations, including orders of deportation."

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

RALPH S. SPRITZER,
*Acting Solicitor General.**
FRED M. VINSON, JR.,
Assistant Attorney General.
L. PAUL WININGS,
General Counsel,
CHARLES GORDON,
Deputy General Counsel,
Immigration and Naturalization Service.

SEPTEMBER 1965.

*In lieu of the Solicitor General, who has disqualified himself.

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